

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 34707 & 34816

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 433
	)	
Plaintiff-Respondent,	)	Filed: April 21, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
BRET R. RIGGINS,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Charles W. Hosack, District Judge.

Judgment of conviction for felony driving under the influence, with enhancement for being a persistent violator, affirmed; order revoking probation, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Bert R. Riggins appeals from his judgment of conviction for felony driving under the influence (DUI), with an enhancement for being a persistent violator. Riggins also appeals from the district court's order revoking his probation in an unrelated case. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Riggins recklessly drove his vehicle down a two-lane highway at a high rate of speed. He swerved around and cut off several vehicles, causing them to drive off of the roadway. One of the vehicles was driven by M.T. Riggins narrowly passed M.T.'s vehicle with a semi-truck approaching in the other direction. This caused her to drive off the roadway in order to avoid a head-on collision with the semi-truck. M.T. followed Riggins at a safe distance until he pulled into a bar parking lot. M.T. observed that Riggins had difficulty standing and walking, was

slurring his speech, and attempted to apologize and shake hands with M.T. A passenger in M.T.'s vehicle grabbed Riggins' outstretched hand and put him in an arm hold on the hood of Riggins' car while M.T. called the police. After M.T. called the police, Riggins lost consciousness.

After an officer arrived, it took some time to arouse Riggins from his unconsciousness. Riggins claimed that he had just walked out of the bar when he was jumped and knocked unconscious. However, that conflicted with Riggins' later claim that he had just come from another bar from which he produced a receipt. The officer observed that Riggins had bloodshot and glassy eyes, slurred his speech, had difficulty keeping his balance, and smelled of alcohol. Riggins admitted that he had been drinking. The officer then performed field sobriety tests: a horizontal gaze nystagmus test, a walk-and-turn test, an ABC test, and a finger dexterity test. Riggins failed the horizontal gaze nystagmus test, refused the walk-and-turn test after he unsuccessfully attempted to stand as directed with his right foot heel-to-toe with his left foot, failed the ABC test by missing several letters and ignoring the officer's instruction not to sing them, and failed the finger dexterity test because he had difficulty touching his fingertips to his thumb in the proper order. Riggins then refused to submit to a counting test and was arrested.

In Docket No. 34070, Riggins was charged with felony DUI, I.C. §§ 18-8004 and 18-8005, and for being a persistent violator, I.C. § 19-2514, because of two previous DUI convictions. A jury found Riggins guilty of DUI and, after a bench trial, the district court found that Riggins had been convicted of DUI on two previous occasions and that he was a persistent violator. The district court sentenced Riggins to a unified term of ten years, with a minimum period of confinement of two years.

Following his DUI conviction, the state filed a motion to revoke Riggins' probation in Docket No. 34816, an unrelated case, which involved convictions for DUI and burglary. Riggins admitted that his felony DUI conviction constituted a violation of his probation. The district court revoked probation and reinstated Riggins' sentences, ordering that they run concurrently with the felony DUI sentence imposed in the instant case. Riggins appeals. In Docket No. 34707, Riggins argues that the prosecutor committed misconduct and, thus, he should be awarded a new trial for felony DUI. In Docket No. 34816, Riggins argues that if the judgment of conviction for felony DUI is vacated, the district court's order revoking probation should also be

vacated because it was based on his admission of the felony DUI conviction. These appeals have been consolidated for our review.

## II. ANALYSIS

### A. Prosecutorial Misconduct

Riggins claims several instances of prosecutorial misconduct occurred during his trial for felony DUI. He argues that the prosecutor, on numerous occasions, attempted to elicit testimony from the arresting officer regarding Riggins' credibility. Additionally, Riggins argues that, during closing argument, the prosecutor impermissibly shifted the burden of proof by using Riggins' refusal to submit to evidentiary testing to determine his blood alcohol content against him, argued to the jury that Riggins' version was not believable, and vouched for the credibility of two of the state's witnesses. Because some of Riggins' allegations of misconduct were preserved by a timely objection before the district court and several were not, we will consider them accordingly.

#### 1. Issues preserved by objection

Although our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, the prosecutor is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.* When there has been a contemporaneous objection we determine factually if there was prosecutorial misconduct, then we determine whether the error was harmless. *Id.*; *State v. Hodges*, 105 Idaho 588, 592, 671 P.2d 1051, 1055 (1983); *State v. Phillips*, 144 Idaho 82, 88, 156 P.3d 583, 589 (Ct. App. 2007). A conviction will not be set aside for small errors or defects that have little, if any, likelihood of having changed the results of the trial. *State v. Pecor*, 132 Idaho 359, 367-68, 972 P.2d 737, 745-46 (Ct. App. 1998). Where prosecutorial misconduct is shown, the test for harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *Id.* at 368, 972 P.2d at 746.

Riggins first alleges that the prosecutor committed misconduct by asking the officer on redirect examination whether he believed Riggins' claim that he had been battered. The following exchange occurred on redirect examination:

[PROSECUTOR]: Now, why did you not investigate this battery claim of Mr. Riggins?

....

[OFFICER]: Okay. The reason why I did not investigate the so-called battery was the witnesses had a right to detain him because they felt that he was in violation of a crime, or in the commission of a crime. You have the right to detain him while they're notifying the police department until they can get there and continue the investigation.

[PROSECUTOR]: Did you believe his claim that he had been jumped?

[OFFICER]: No.

[TRIAL COUNSEL]: Objection, your Honor.

[COURT]: Well --

[TRIAL COUNSEL]: That's --

[COURT]: Objection overruled.

However, this questioning by the prosecutor was in response to trial counsel's questioning during cross-examination regarding the officer's failure to investigate the battery claim. By inquiring as to the officer's failure to adequately investigate Riggins' claim, trial counsel opened the door for the prosecutor to inquire further as to the officer's reasons for not doing so.

This Court has previously held admissible the testimony of an officer regarding the credibility of a defendant during an investigative interview when the defense opened the door to such questioning during cross-examination. *State v. Drennon*, 126 Idaho 346, 883 P.2d 704 (Ct. App. 1994). At a trial for lewd conduct, Drennon's trial counsel questioned an officer concerning Drennon's demeanor when confronted with the allegation of sexual misconduct with his daughter. *Id.* at 349-50, 883 P.2d at 707-08. The officer testified that Drennon was theatrical. On redirect, the prosecutor then asked the officer what he meant by "theatrical," to which the officer replied that Drennon's reactions did not appear real. When asked to further clarify, the officer testified that he believed Drennon was being deceptive. This Court held that the officer's testimony was admissible because "[h]is statement that Drennon appeared 'theatrical' required explanation in order for the jury to understand the response." *Id.* Similarly, the officer's testimony in this case that he did not investigate Riggins' battery claim, required further explanation in order for the jury to understand the officer's reasoning and motives. In addition, the officer's testimony did not concern the credibility of another witness because Riggins was not a witness in this case. The officer's testimony that he did not investigate the claim because he did not believe Riggins' story was admissible and the prosecutor did not commit misconduct by so inquiring.

Riggins' next allegation of prosecutorial misconduct concerns the prosecutor asking the officer whether he believed that Riggins was being sincere in his claimed inability to perform the requested field sobriety tests. Regarding the officer's insistence that Riggins perform the walk-and-turn test despite his claimed inability, the prosecutor questioned the officer during redirect examination:

[PROSECUTOR]: Why did you continue despite his complaints tell him to go ahead and try to stand that way?

[OFFICER]: Because that's the standardized way of doing it. I wanted to make sure and give him the opportunity to do the standardized tests, and when he made it apparent to me that he just wasn't going to be able to do it, then I moved on.

[PROSECUTOR]: Did you believe his -- at the time, given everything that you had before you, did you believe he was sincere?

At that point, the district court sustained trial counsel's objection that the answer called for speculation.

Earlier in the trial proceedings, the district court admonished the jury that it was not to consider evidence that was the subject of a successful objection and that it was not to guess what the answer might have been. We presume that the jury followed the district court's instructions. *See State v. Kilby*, 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct. App. 1997); *State v. Hudson*, 129 Idaho 478, 481, 927 P.2d 451, 454 (Ct. App. 1996).

Next, Riggins alleges that the prosecutor committed misconduct through the officer's statement that he did not believe that Riggins was being very truthful with him. The following exchange occurred during direct examination:

[PROSECUTOR]: Okay. Okay. Now, so you received that receipt from Mr. Riggins. And then you -- you were questioning him about his story?

[OFFICER]: Correct.

[PROSECUTOR]: And you said he made a comment to you that that was your problem.

[OFFICER]: That it wasn't his problem.

[PROSECUTOR]: Right. Okay. And then did you question him any more regarding where he was coming from or his location?

[OFFICER]: I don't recall. I don't believe so. I think at that point I believe Mr. Riggins wasn't being very truthful with me.

[PROSECUTOR]: Okay.

[TRIAL COUNSEL]: Objection, your Honor. The comment by the witness.

[COURT]: Sustained.

[TRIAL COUNSEL]: Ask that it be stricken.

[COURT]: Ladies and gentlemen, why don't you disregard the last comment concerning the truthfulness. . . .

This statement by the officer was not elicited by the prosecutor. Contrary to Riggins' assertion in his brief, the transcript does not contain any question by the prosecutor prior to this statement which may have indirectly elicited this response. In any event, Riggins' objection was sustained and the jury admonished to disregard the officer's comment. Accordingly, no error has been shown.

Finally, Riggins claims it was misconduct for the prosecutor to use Riggins' refusal to submit to evidentiary testing to determine his blood alcohol content against him during closing argument and rebuttal closing argument. During closing argument, the prosecutor argued:

And then once [Riggins is] arrested for DUI, taken to the jail, and he refuses to take a blood alcohol test. If he was knocked out, as he wants to contend, then why did he refuse to take the blood alcohol test?

Then, during rebuttal closing argument, the prosecutor argued:

[Riggins is] trying as much as he can to not give them any more evidence against him that he's been driving. And then you got the ultimate test, when he gets to the jail. He doesn't even give a reason for not being able to blow into a machine. He just says, "I'm not going to do it."

The officer says, "I told him that he has all these penalties if he refuses, including a one-year license suspension," but that's not enough incentive for him to take that test to prove that he wasn't driving under the influence. Not that he has to prove that he wasn't driving under the influence, but you think that if somebody is innocent of that, they would not have a problem with showing that.

Riggins does not contest the rule in Idaho that refusal of a test to determine blood alcohol content is admissible into evidence in a prosecution for DUI. *See State v. Bock*, 80 Idaho 296, 309, 328 P.2d 1065, 1073 (1958); *State v. Curtis*, 106 Idaho 483, 489, 680 P.2d 1383, 1389 (Ct. App. 1984). Rather, Riggins argues that the prosecutor impermissibly shifted the burden of proof by arguing, in effect, that if Riggins were innocent he would have submitted to evidentiary testing.

During closing argument, a prosecutor may not misrepresent the law or the reasonable doubt burden. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. However, that is not what the prosecutor did in this case. The prosecutor affirmed to the jury that Riggins did not have the burden of proving at trial that he was not driving under the influence. The prosecutor stated that

Riggins refused testing and, if he had no reason to believe that he was not over the legal limit, he would have submitted in order to prove his innocence. The prosecutor's argument was not the same as telling the jury that Riggins had failed to prove his innocence at trial because he refused evidentiary testing. Rather, the prosecutor argued that anyone who was wrongly accused of DUI would take the opportunity to prove his or her innocence to the arresting officer. That was a permissible use of Riggins' refusal to submit to the evidentiary testing. Therefore, these statements during closing argument and rebuttal closing argument do not constitute prosecutorial misconduct.

## **2. Issues not preserved by objection**

When there is no contemporaneous objection, a conviction will be reversed for prosecutorial misconduct only if the conduct is sufficiently egregious so as to result in fundamental error. *Field*, 144 Idaho at 571, 165 P.3d at 285. Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. *State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003). Prosecutorial misconduct rises to the level of fundamental error only if the acts or comments constituting the misconduct are so egregious or inflammatory that any ensuing prejudice could not have been remedied by a curative jury instruction. *Id.* The rationale of this rule is that even a timely objection to such inflammatory statements would not have cured the inherent prejudice. *Id.* However, even when prosecutorial misconduct has resulted in fundamental error, the conviction will not be reversed when that error is harmless. *Field*, 144 Idaho at 571, 165 P.3d at 285. The test for whether prosecutorial misconduct constitutes harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *Pecor*, 132 Idaho at 368, 972 P.2d at 746.

When the defendant did not object at trial, our inquiry is, thus, three-tiered. *See Field*, 144 Idaho at 571, 165 P.3d at 285. First, we determine factually if there was prosecutorial misconduct. If there was, we determine whether the misconduct rose to the level of fundamental error. Finally, if we conclude that it did, we then consider whether such misconduct prejudiced the defendant's right to a fair trial or whether it was harmless.

Riggins first alleges that the prosecutor committed misconduct by questioning the officer concerning his training in making credibility determinations. This line of questioning immediately followed the prosecutor's inquiry whether the officer believed Riggins' battery claim. The following exchange then occurred:

[PROSECUTOR]: Are you trained to -- in investigating a crime, are you trained to weigh the credibility of witnesses?

[OFFICER]: I am.

[PROSECUTOR]: And tell us, what do you do in doing that, just generally?

[OFFICER]: Take the totality of the circumstances. I've got one person that's telling me one story and I keep coming back to them and asking the, you know, basically saying the same thing, but I'm asking them in a different way and they keep telling me the same story, that lends credibility to them

If the person switches their story, changes things around, nothing's really the same, that takes some of their credibility away.

[PROSECUTOR]: So did you conduct your investigation in that manner at this time with Mr. Riggins and these other people?

[OFFICER]: I did.

As we held above, trial counsel opened the door to this line of questioning on cross-examination by asking the officer about his failure to investigate Riggins' battery claim. The prosecutor was then permitted to question the officer concerning why he did not investigate the claim. To this inquiry on redirect, the officer testified that he did not investigate, in part, because he did not believe Riggins' story. The prosecutor was then permitted to ask the officer for the basis of his opinion. Accordingly, the prosecutor did not commit misconduct by asking the officer concerning his basis for determining whether he believed Riggins was being truthful about his battery claim. Furthermore, even were we to assume error, this does not rise to the level of fundamental error as it could have been cured by a limiting instruction to the jury had a contemporaneous objection been raised.

The remainder of Riggins' allegations of prosecutorial misconduct concern statements during closing argument and rebuttal closing argument about the weight to be given to certain witnesses' testimony and to Riggins' version of the events. Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.*; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to

the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Phillips*, 144 Idaho at 86, 156 P.3d at 587.

Closing argument should not include counsel's personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also State v. Garcia*, 100 Idaho 108, 110-11, 594 P.2d 146, 148-49 (1979); *State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995); *State v. Ames*, 109 Idaho 373, 376, 707 P.2d 484, 487 (Ct. App. 1985). A prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence, but the prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial. *Phillips*, 144 Idaho at 86 n.1, 156 P.3d at 587 n.1. The safer course is for a prosecutor to avoid the statement of opinion, as well as the disfavored phrases "I think" and "I believe" altogether. *Id.*

Appeals to emotion, passion, or prejudice of the jury through the use of inflammatory tactics are impermissible. *Phillips*, 144 Idaho at 87, 156 P.3d at 588. *See also State v. Raudebaugh*, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *Pecor*, 132 Idaho at 367, 972 P.2d at 745. The prosecutor's closing argument should not include disparaging comments about opposing counsel. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also Sheahan*, 139 Idaho at 280, 77 P.3d at 969; *State v. Brown*, 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct. App. 1998); *State v. Baruth*, 107 Idaho 651, 657, 691 P.2d 1266, 1272 (Ct. App. 1984).

During closing argument, the prosecutor made the following comments regarding the police investigation at the scene:

[The officers] had all of the physical signs. They went exactly with what [M.T.] was telling them had occurred. They had the observations of [Riggins]. They had the driving pattern, which was consistent with someone who has possibly been drinking alcohol. They had his own statements. They had the contradictory statements that were made by [Riggins]. He didn't want to admit that he had been driving. And they had this statement, "No, this is not the drinking issue. It's that I was jumped by these young punks."

These officers cannot focus on the unbelievable. They have to go with what the evidence shows them when they're investigating any crime.

They saw no signs on Mr. Riggins that he was injured in any type of altercation. He refused medical attention, as you've heard from them. There were [sic] no indication and no evidence consistent with what Mr. Riggins was

trying to claim at the time it happened to him. That's why his version of what happened is unbelievable. It's not reasonable to believe what he said.

Other than acknowledging that the foregoing comment was made by the prosecutor during closing argument, Riggins makes no argument as to why this statement amounted to prosecutorial misconduct. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Even if additional argument were supplied, we conclude that this comment during closing argument was not an impermissible statement of personal opinion or belief of Riggins' lack of credibility.

Riggins next alleges that the prosecutor impermissibly vouched for the credibility of M.T. and the officer during rebuttal closing argument. The prosecutor argued that M.T. had no motive in testifying but to tell the truth and that, even though the videotape from the officer's dashboard camera did not show Riggins noticeably swaying, the jury should give weight to the officer's first-hand observations. The prosecutor stated:

Just going to keep this simple. This all basically goes down to weighing credibility of witnesses. Essentially that's what this is. And you're going to look at the motives of the different players here, different parties. You can look at the motives of [Riggins], you can look at the motives of the people that came in and testified.

[M.T.'s] motives are basically to report to you what she observed that day. It was a very traumatic event for her and her family. And she was called into court. She swore under oath to you that this is what happened. To question her credibility because she can't remember whether she honked a horn or not six months after the fact, there's no credibility issue there.

She doesn't recall whether she honked a horn or whether the defendant was -- whether she saw him on the hood or not. It's -- that's not going to any question of her motives. All that you can see from her testimony is that her motive was to tell the truth.

Regarding the absence of noticeable swaying shown on the officer's dashboard camera videotape, the prosecutor argued:

What appears right there when you're standing two feet in front of a person to be a lot of swaying is much different from what you see on videos. In the videotape you're not going to pick up the unique characteristics, the specifics, you know, of amount of distance of the swaying. So you have to go with what the officers saw right there next to Mr. Riggins while they were testing.

Riggins contends that these statements impermissibly vouched for the credibility of those two witnesses.

These statements by the prosecutor were made during rebuttal closing argument. Prior to rebuttal closing argument, during the closing argument for the defense, trial counsel attacked the credibility of both M.T. and the officer. Trial counsel argued that the jury should not believe M.T.'s account because she could not remember if she honked her horn, she did not just brake and let Riggins drive by, and her account that Riggins laid on the ground was inconsistent with the officer's testimony that he was on the hood of his car. Trial counsel further contended that her testimony was biased because she was upset. Trial counsel argued that the officer was biased because of his predetermined opinion, upon arriving at the scene, that Riggins was guilty. He played the videotape from the officer's dashboard camera and argued that it contradicted the officer's testimony that Riggins was swaying because no swaying motions were apparent in the recording.

The prosecutor's response to trial counsel's arguments during closing argument was not an impermissible expression of personal opinion or belief. Trial counsel's attack on these two witnesses' testimony opened the door for the prosecutor to repair their credibility in light of what was shown by the evidence at trial. The prosecutor explained that M.T. had no motivation to lie and that her inability to remember whether she honked her horn or whether Riggins laid on the ground or on the hood of his car did not discredit her version of the events. The prosecutor further explained how the officer could testify that Riggins was swaying when the videotape from the officer's dashboard camera did not show noticeable movement. Therefore, we conclude that these statements by the prosecutor do not constitute prosecutorial misconduct.

#### **B. Other Issues**

Riggins also argues that this Court should vacate his judgment of conviction as a sanction against the prosecutor's office based on repeated instances of prosecutorial misconduct. Riggins further argues that if this Court vacates his judgment of conviction for felony DUI based on prosecutorial misconduct, we should also reverse the district court's order revoking his probation and reinstating his sentences in Docket No. 34816 because it was based on Riggins' admission that he was convicted of felony DUI. Because we conclude that no instances of prosecutorial misconduct occurred and no error has been shown, we need not further address any of Riggins' remaining issues.

**III.**  
**CONCLUSION**

Riggins has shown no instances of prosecutorial misconduct during his trial. Therefore, his judgment of conviction for felony DUI, with an enhancement for being a persistent violator, is affirmed. Accordingly, the district court's order revoking Riggins' probation and reinstating his sentences is also affirmed.

Judge GUTIERREZ and Judge GRATTON, **CONCUR.**